

1 GARY M. RESTAINO
2 United States Attorney
3 District of Arizona
4 KEVIN M. RAPP
5 Arizona State Bar No. 14249
6 Email: kevin.rapp@usdoj.gov
7 COLEEN SCHOCH
8 Georgia State Bar No. 366545
9 Email: Coleen.Schoch@usdoj.gov
10 Assistant U.S. Attorneys
11 Two Renaissance Square
12 40 N. Central Ave., Suite 1800
13 Phoenix, Arizona 85004
14 Telephone: 602-514-7500
15 Attorney for Plaintiff

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

12 United States of America,
13 Plaintiffs,
14 vs.
15 David Allen Harbour,
16 Defendants.

CR-19-00898-PHX-DLR (DMF)

17
18 **UNITED STATES' POSITION ON
19 ORDER TO SHOW CAUSE**

20
21 **SUMMARY**

22 At a status conference on April 19, 2022, the Court ordered the government to
23 produce certain discovery sought by Defendant Harbour by May 9, 2022. (Doc. 374) At
24 the same time, Defendant Harbour was ordered to advise the Court by May 16, 2022,
25 whether an Order to Show Cause (OSC) should be entered directing Princeton Alternative
Income Fund, L.P. (“PAIF” or “the Fund”), LJP Consulting, LLC and Philip Burgess
(collectively, “the Witnesses”), to show cause why the Witnesses should not be sanctioned
for failing to produce certain documents subpoenaed by the Defendant pursuant to Rule
17(c).

26 The government was at a disadvantage in responding to the Defendant’s application
27 at the April 19th status conference. The Defendant had initially filed a sealed *ex parte*
28 motion to compel compliance by the Witnesses with his Rule 17 subpoenas (Doc. 167),

1 which was granted in part and denied in part without the involvement of the government.
 2 See (Doc. 198, p. 4). Thereafter, extensive negotiations apparently took place between the
 3 Defendant's former counsel and counsel for the Witnesses to narrow and comply with the
 4 subpoenas, again without the involvement of the government.

5 Since the April 19th status conference, the government has reviewed the history of
 6 this particular issue and now advises the Court that the Defendant has received from both
 7 the government and the Witnesses all of the documents that are relevant to Count 3 of the
 8 Superseding Indictment, which alleges that he fraudulently obtained \$1.1 million from
 9 PAIF in August 2015. Most recently, for example, the Witnesses produced documents that
 10 prove that the Defendant personally sent them a fraudulent accounts receivable aging report
 11 that the Fund relied upon in transferring \$1.1 million to Harbour's company in August
 12 2015 as alleged in Count 3. (Doc. 352). As the government previously submitted to the
 13 Court in opposing one of the Defendant's previous motions to continue the trial, see (Doc.
 14 225), Harbour's internal bookkeeper, L.P., has told the government that Harbour personally
 15 falsified the aging report before he sent it to PAIF. *Id.*, pp. 2-3. And as the government
 16 told the Court in that same submission more than a year ago, in light of the approximately
 17 1,228 PAIF related documents that the Defendant has already received, the additional
 18 documents that he is seeking from the Witnesses "are of marginal relevance" and his Rule
 19 17 subpoenas are "overly broad." (Doc. 225, pp. 2-4.)

20 The Defendant's present attempt to compel further document production from the
 21 government and the Witnesses should be denied. In the case of PAIF, the Defendant's
 22 application amounts to harassment of one of the victims of his alleged fraud and, in the
 23 case of P. B., amounts to harassment of a potential government witness. The Court should
 24 find that the government does not need to produce additional documents to the Defendant
 25 by May 9, 2022, and that the Defendant's request for an OSC directed to the Witnesses, or
 26 for sanctions to be imposed on them, should be denied.

27 **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

28 In August 2020, Defendant's then counsel, Alan Baskin, Esq., served Rule 17(c)

1 subpoenas on PAIF, LJP Consulting and P. B. (“the Witnesses.”). On November 9, 2020,
 2 Harbour filed a motion to seal his *ex parte* motion to compel compliance with the
 3 subpoenas. (Doc. 150) and an *ex parte* motion to compel compliance with the subpoenas
 4 (Doc. 151). The Court granted both motions by Orders filed on November 25, 2020 (Doc.
 5 160) and December 8, 2020 (Doc. 166). After a hearing on January 26, 2021, the Court
 6 entered an Order on January 29, 2021 (Doc. 198) compelling the Witnesses to produce
 7 eight (8) categories of documents to both the government and the Defendant or to the Court.
 8 The Court also ordered that the Witnesses “may file an application . . . should an agreement
 9 not otherwise be reached as to the payment of costs associated with the production.” *Id.*

10 Thereafter, several months of negotiations apparently took place between counsel
 11 for the Defendant and counsel for the Witnesses about attempts to narrow the scope of the
 12 documents to be produced and the costs of production, as well as an initial production of
 13 responsive documents deemed to be insufficient by the Defendant’s then-counsel. Some
 14 of those negotiations are referenced in one of the exhibits attached to a Motion for
 15 Sanctions filed by the Defendant’s subsequent counsel. See Doc. 340 (Motion); Doc 340-
 16 1 (Exhibit 2). Despite the obvious disagreement of the clients, the negotiations reflect a
 17 good faith effort by counsel to reach agreement without the need for the intervention of the
 18 Court.

19 Ultimately, after fits and starts and without recapping all of the negotiations here,
 20 the parties agreed that PAIF would begin producing additional documents to Defendant’s
 21 counsel in exchange for the Defendant advancing \$5,000 to partially offset the cost of
 22 production. See email dated November 5, 2021, from Mladen Milovic to Gerald Krovatin,
 23 Doc. 340-1, p. 3 (“Gerry, we are willing to retract our requests for production of
 24 information from PAIF’s PPM and related documents. Accordingly, please deposit the
 25 check we sent to you and have your clients undertake the work to comply with our
 26 previously agreed upon document requests. Also, please advise when we can expect to
 27 receive responses to our requests. Thanks, Mladen.”)

28 In early 2022, new counsel for Defendant Harbour took the position that the

1 Witnesses had not produced the documents set forth in the Court's January 2021 Order, or
 2 as "pared down" as agreed between counsel. As a result, at Defense counsel's insistence,
 3 Mr. Burgess, one of the Witnesses, began to produce additional documents, and sent Ms.
 4 Adams several additional documents in thirteen (13) separate emails. Ms. Adams objected
 5 to that method of production and instructed Mr. Burgess to stop sending her emails and
 6 documents. Thereafter, Ms. Adams and Mr. Dichter filed a motion for sanctions against
 7 the Witnesses for noncompliance with the Defendant's subpoenas. (Doc. 340).
 8 Specifically, Defendant argued that the Witnesses had not produced the borrowing base
 9 certificate to support the August 11, 2015, disbursement of \$1.1 million to the Defendant,
 10 as charged in Count 3 of the Superseding Indictment. *Id.* Defendant argued that the
 11 Witnesses should produce the borrowing base calculation, or a declaration that it did not
 12 exist, within 72 hours in order to avoid a motion for sanctions. *Id.*

13 The Witnesses filed a response on March 3, 2002 (Doc. 352). The response included
 14 a sworn Declaration from Alonzo Primus, the principal of LJP Consulting, LLC, one of the
 15 Witnesses. (Doc. 352-1). Primus traced the history of the Witnesses' dealings with the
 16 Defendant leading up to the August 11, 2015, disbursement of \$1.1 million. He attached
 17 as an exhibit to his Declaration an email dated August 6, 2015, to him from the Defendant
 18 himself attaching a July 31, 2015, accounts receivable aging report. It was that email from
 19 the Defendant and that false report on which PAIF relied in transferring \$1.1 million to the
 20 Defendant's company on August 15, 2011. See Primus Declaration, ¶ 15. (Doc. 352-1, p.
 21 3). Counsel for the Witnesses explained that:

22
 23 While subsequent borrowing base calculations that were submitted by Harbour to support
 24 subsequent monthly draws from the Fund looked different from and provided more
 25 information than the July 31, 2015, Aging Summary Report, they were functionally the
 26 same. Both reports were information provided by Harbour through his companies that he
 27 intended that Green Circle and the Fund would rely on in lending additional funds.

28 See (Doc. 352, p. 5).

29 As mentioned, the government previously advised the Court that L.P., a cooperating

1 government witness, who was Harbour’s internal bookkeeper, has told the government that
 2 Harbour personally falsified the July 31, 2015, aging report before he sent it to PAIF. (Doc.
 3 225, pp. 2-3.)

4 Defendant Harbour responded to the Witnesses’ submission with a Reply filed
 5 March 9, 2022. (Doc. 354). Harbour argued that, while the Primus Declaration “was a very
 6 positive moment . . . an admission we thought would never be made,” there are more
 7 documents “that will cement the point that Harbour had nothing to do with the existence
 8 of the July 31, 2015, A/R Aging Report . . .” *Id.*, p. 5. Harbour insisted that the Witnesses
 9 still needed to produce four *additional* categories of documents:

10

- 11 1. Green Circle/Cash Source daily A/R Aging Reports from June 1, 2015 through August
- 12 31, 2015 including the daily LMS printouts that listed all the Green Circle borrowers by
- 13 name with balances,
- 14 2. Green Circle’s June, July, and August 2015 balance sheet, and cash flow statements,
- 15 3. The Emails originally requested for June through August plus September 2015,
- 16 4. Microbilt Scoring that supported the August 11, 2015 disbursement, including the loan
- 17 portfolio of the borrowers whose accounts were scored.

18 *Id.*, p. 6.

19 ARGUMENT

20 The additional documents that the Defendant seeks are completely irrelevant and
 21 unduly burdensome on the government and the Witnesses. As referenced above, the
 22 government addressed the Defendant’s argument more than a year ago in opposing one of
 23 his motions for a continuance because he had not received subpoenaed documents from the
 24 Witnesses. (Doc. 225). The government argued there that Harbour’s Rule 17 subpoenas
 25 themselves “were overly broad by seeking information unrelated to the specific allegation
 26 in the superseding indictment (SSI) regarding the fraud perpetrated on PAIF.” *Id.*, p. 2.
 27 The government revealed that one of its witnesses, L.P., Harbour’s internal bookkeeper,
 28 “advised investigating agents that she provided Harbour via email the Borrowing Base
 spreadsheet, which he then manipulated, altered, and returned to her to email to PAIF. . . .
 In sum, L.P. was not comfortable with the spreadsheets that were provided to PAIF and

1 knew the false information provided by Harbour was material to their lending decision.”
2 *Id.*, pp. 2-3.

3 The government went on in that submission to identify by specific Bates stamp
4 numbers a total of “approximately 1,228 PAIF related documents” that had already been
5 produced to Harbour. *Id.*, p. 4. With reference to the documents that Harbour sought as a
6 basis for a continuance last year, and the same documents that Harbour is currently seeking
7 from the government and the Witnesses, the government submitted that “the documents
8 sought by Harbour *after* August 11, 2015, are irrelevant to [Count 3 of the SSI]. *Id.* That
9 is also the case for documents *before* August 11, 2015 that have nothing to do with the
10 August 11, 2015 disbursement itself, such as Green Circle’s balance sheets, cash flow
11 statements, borrower information and “scoring” of the Green Circle borrowers’ loan
12 portfolio. None of that information can possibly undermine or impeach Harbour’s own
13 statement and conduct in producing a falsified accounts aging report, prepared by his own
14 internal bookkeeper that was the basis for the August 11, 2015 disbursement. Defendant’s
15 continued arguments about those additional documents are a classic fishing expedition
16 designed to harass one of his victims in this case by causing PAIF to spend time, effort and
17 counsel fees complying with endless requests to produce irrelevant documents.

18 **CONCLUSION**

19 The Defendant’s latest application to compel the government to produce additional
20 documents should be denied and the Witnesses likewise should not be subjected to an
21 Order to Show Cause or a further application for sanctions.

22 Respectfully submitted this 5th day of May 2022.

23

24

GARY M. RESTAINO
United States Attorney
District of Arizona

25

26

s/Kevin M. Rapp
KEVIN M. RAPP
Assistant U.S. Attorney

27

28

CERTIFICATE OF SERVICE

I hereby certify that on this same date, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing a copy to the following CM/ECF registrant:

Stephen M. Dichter
Attorney for Defendant

s/Daniel Parke
U.S. Attorney's Office